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No. 02-693

In the Supreme Court of the United States

JOHN M. LAMIE, PETITIONER

v.

UNITED STATES TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether Section 330(a)(1) of the Bankruptcy Code, 11 U.S.C. 330(a)(1), authorizes a court to use the funds of a bankruptcy estate to compensate an attorney of a chapter 7 debtor.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 290 F.3d 739. The opinion of the district court (Pet. App. 15a-27a) is reported at 260 B.R. 273. The opinion of the bankruptcy court (Pet. App. 28a-44a) is reported at 253 B.R. 724.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2002. A petition for rehearing was denied on August 5, 2002 (Pet. App. 45a). A petition for a writ of certiorari was filed on November 4, 2002, and was granted on March 10, 2003. The jurisdiction of this Court rests under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an Appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. United States Trustees supervise the administration of bankruptcy cases and trustees within specified geographic regions. 28 U.S.C. 581-589. "The United States Trustee Program acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system." http://www.usdoj.gov/ust/mission.htm. See H.R. Rep. No. 595, 95th Cong., 2d Sess. 88 (1977) (United States Trustees "serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena."). Congress provided in the Code that "[t]he United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this Title." 11 U.S.C. 307. Congress also has specifically directed United States Trustees to "review[] * * * applications filed for compensation and reimbursement under section 330 of title 11[] and * * * [to] fil[e] with the court" any "objections to such application." 28 U.S.C. 586(a)(3)(A)(i) and (ii).

2. On December 24, 1998, Equipment Services, Inc., filed a voluntary petition for relief under the debt reorganization provisions of chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.* At the time of the filing, the company had retained petitioner, an attorney, to represent it in the bankruptcy proceedings and had given petitioner a $6000 retainer, of which $1000 was used to pay the fees and costs of filing the petition. Petitioner deposited the remaining $5000 in an escrow account, to be drawn upon as petitioner earned fees. On January 26, 1999, the Bankruptcy Court approved

petitioner's employment as the attorney for the debtor-in-possession in the chapter 11 proceeding. Pet. App. 2a, 28a; see 11 U.S.C. 327(a), 1107.

On March 17, 1999, on the motion of the United States Trustee, the proceeding was converted into a case under the liquidation provisions of chapter 7. 11 U.S.C. 1112(b). Petitioner filed an application with the Bankruptcy Court seeking $2325 in attorneys fees, $1325 of which was earned during the chapter 11 proceeding and $1000 of which was earned during the chapter 7 proceeding. The United States Trustee objected to the application to the extent that it requested $1000 in compensation for services rendered after the case was converted to a chapter 7 proceeding. Pet. App. 4a, 15a-17a, 29a.

The Bankruptcy Court held that the Code did not authorize a chapter 7 debtor's attorney to be paid funds from the bankruptcy estate. Pet. App. 30a-38a. The court explained that, before the Code was amended in 1994, 11 U.S.C. 330 (1988) had authorized an award to any debtor's attorney, but Congress in a 1994 amendment to Section 330 deleted the statutory language authorizing such an award. Pet. App. 34a. The court further observed that Congress in 1994 added a separate provision to Section 330 that "provide[s] express authority for payment of counsel to a Chapter 12 or 13 debtor from the estate." Pet. App. 33a (citing 11 U.S.C. 330(a)(4)(B)). The court accordingly concluded that there was no authority to award fees to a chapter 7 debtor's attorney. The Bankruptcy Court nonetheless awarded petitioner fees for services rendered while the case proceeded under chapter 7 because the court concluded that the pre-petition retainer was not, under

state law, property of the bankruptcy estate. *Id.* at 38a-43a.[1]

The district court affirmed. Pet. App. 15a-26a. The court concluded that Section 330(a)(1) was "plain" in not authorizing fees to a chapter 7 debtor's attorney. *Id.* at 22a, 24a. The district court nonetheless agreed with the bankruptcy court's conclusion that, under state law, the retainer was not property of the estate and accordingly that petitioner was entitled to draw from the retainer fees earned during the chapter 7 proceeding. *Id.* at 25a-26a.

3. A divided panel of the court of appeals affirmed the district court's construction of Section 330, but the panel unanimously reversed the district court's conclusion that the retainer was not property of the bankruptcy estate. Pet. App. 1a-14a. The court of appeals held that Section 330(a) does not authorize a chapter 7 debtor's attorney to be compensated from the estate. *Id.* at 5a-9a. The court of appeals reasoned that "§ 330(a), as revised in 1994, omits the phrase 'or the debtor's attorney' from the list of persons to whom a court may award 'reasonable compensation' from the bankruptcy estate for services rendered in a Chapter 7 proceeding." *Id.* at 6a. The court concluded that it "should follow the plain language of the 1994 version of § 330(a), particularly because application of that plain language supports a reasonable interpretation of the Bankruptcy Code." *Id.* at 8a.

Judge Michael dissented from the court's holding that Section 330 did not authorize the award of fees to a

[1] On July 10, 2000, the Bankruptcy Court had separately approved petitioner's application for $1325 in fees earned for services rendered while he represented the company in its capacity as a debtor-in-possession under chapter 11. Pet. App. 29a n.18.

chapter 7 debtor's attorney. Pet. App. 13a-14a. In his view, the deletion of the phrase "or to the debtor's attorney" from the statute was a "drafting error" subject to correction by the court. *Id.* at 13a.

SUMMARY OF ARGUMENT

A. The 1994 amendments to Section 330 removed "the debtor's attorney" from the list of eligible individuals entitled to receive compensation. The current version of Section 330 thus contains no statutory authority to use estate funds to compensate a chapter 7 debtor's attorney. The judgment of the court of appeals therefore must be affirmed unless petitioner meets the heavy burden of showing that the omission of the phrase "or the debtor's attorney" from the statute is unquestionably a scrivener's error that produces absurd results.

B. Petitioner fails to demonstrate beyond question that Congress's omission was an accident, much less one that, if not corrected, would produce results that Congress could not have rationally intended. The statutory context indicates that Congress purposefully omitted the phrase "or the debtor's attorney" from Section 330. The omission is the most direct and obvious means to eliminate the authority to pay debtors' attorneys out of estate funds held for the benefit of creditors. Moreover, while the 1994 amendments to 11 U.S.C. 330(a) (1988) omitted the phrase "or the debtor's attorney," the amendments enacted a new provision authorizing only attorneys for individual chapter 12 or 13 debtors to be paid fees from the estate. 11 U.S.C. 330(a)(4)(B). Congress's simultaneous denial of similar authorization for attorneys for chapter 7 debtors reflects deliberate action on the part of Congress.

C. The legislative history also is consistent with the conclusion that Congress intentionally omitted the phrase "or the debtor's attorney" from Section 330(a)(1). The phrase was deleted in the same amendment that added the authorization in Section 330(a)(4)(B) for estate fees to be paid solely to attorneys for chapter 12 or 13 debtors. Furthermore, the members of Congress had over five months before final enactment in which to read and consider the text of the Senate bill that had deleted the phrase "or the debtor's attorney" from Section 330(a). In that intervening period, the deletion of the phrase was brought to the attention of Congress by an organization of debtors' attorneys who expressed no objection to the deletion, and Congress thereafter left the provision unchanged.

D. Enforcing the statute as written serves legitimate and substantial policy objectives. Unlike proceedings under chapters 11, 12, and 13, in which the debtor is responsible for developing repayment plans for the benefit of creditors, a proceeding under chapter 7 involves liquidation of the estate by a trustee. 11 U.S.C. 704. Chapter 7 is a zero-sum game in which any funds diverted from the estate to pay attorneys reduce the amount of funds available to pay creditors. Congress therefore quite rationally could have determined to preserve chapter 7 estate funds for the benefit of creditors.

At the same time, denial of estate funds to pay a chapter 7 debtor's attorney is entirely consistent with the orderly administration and liquidation of chapter 7 estates. Such denial does not affect the 96% of all chapter 7 cases in which there are no funds available in the estate to pay counsel (or creditors, for that matter). Moreover, where funds *are* available, the Code gives

the trustee the power to seek court approval to hire counsel, including the debtor's counsel, where appropriate and in the best interest of the estate. 11 U.S.C. 327(a) and (e). Chapter 7 debtors play very little role in the administration of the estate and are therefore given no similar statutory authority to retain counsel to assist the administration of the estate. Finally, regardless of the size of the estate, a chapter 7 debtor who retains counsel for the debtor's personal benefit may compensate counsel by giving counsel a pre-petition flat fee, by using his post-petition income, or both. For those reasons, the United States Trustees, who are charged with supervising the administration of bankruptcy cases, 28 U.S.C. 586(a)(3), view enforcing Section 330(a)(1) as written as furthering the proper administration of chapter 7 estates.

ARGUMENT

SECTION 330 DOES NOT AUTHORIZE THE USE OF ESTATE FUNDS TO COMPENSATE A CHAPTER 7 DEBTOR'S ATTORNEY

The court of appeals correctly concluded that Section 330(a)(1) is plain on its face in not authorizing compensation to the debtor's attorney in a chapter 7 case. The statutory context, history, and purposes are consistent with the view that Congress intentionally omitted the phrase "or the debtor's attorney" from the statute. Finally, because the statute as written creates a sensible statutory scheme, there is no warrant for petitioner's claim that the Court should rewrite the Code.

A. The Plain Text Of Section 330(a)(1) Does Not Authorize Estate Funds To Be Paid To A Chapter 7 Debtor's Attorney

1. The assets of a chapter 7 estate must be distributed pursuant to the priority provisions of the Code. 11 U.S.C. 503, 507, 726. The Code gives priority to administrative expenses, 11 U.S.C. 507(a)(1), and permits "compensation and reimbursement awarded under section 330(a)" to be treated as an administrative expense, 11 U.S.C. 503(b)(2). *In re Milwaukee Engraving Co.*, 219 F.3d 635, 636-637 (7th Cir. 2000); *F/S Airlease II, Inc.* v. *Simon*, 844 F.2d 99, 108-109 (3d Cir.), cert. denied, 488 U.S. 852 (1988). Petitioner in this case sought such priority treatment in applying for compensation out of the funds of the chapter 7 estate under Section 330(a) for services performed during the chapter 7 proceeding. Pet. App. 2a.

The 1994 amendments to Section 330(a), however, compel the conclusion that the Code does not authorize estate funds to be awarded to a chapter 7 debtor's attorney. As originally enacted in the Bankruptcy Reform Act of 1978, Section 330(a), entitled "Compensation of officers," provided that:

> After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*—
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons

> employed by such trustee, professional person, or attorney, as the case may be, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services, other than in a case under this title; and
>
> (2) reimbursement for actual, necessary expenses.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 330, 92 Stat. 2564 (11 U.S.C. 330(a) (1988)) (emphasis added). In the Bankruptcy Reform Act of 1994, Congress substantially revised Section 330(a) to provide in relevant part:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
>
> (B) reimbursement for actual, necessary expenses.
>
> * * * * *
>
> (4) * * * (B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case

> based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 224, 108 Stat. 4130 (11 U.S.C. 330(a)(1) and (4)(B)).

Thus, the prior version of Section 330(a) authorized compensation to "a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney." By contrast, the statute as revised permits an award of compensation to only "a trustee," "an examiner," and "a professional person employed under section 327 or 1103." 11 U.S.C. 330(a)(1). Section 330(a)(1) thus unambiguously "excludes attorneys from its catalog of professional officers of a bankruptcy estate who may be compensated for their work." *In re Pro-Snax Distribs., Inc.*, 157 F.3d 414, 425 (5th Cir. 1998). Section 330(a)(1) is accordingly "clear textually on its face" in not providing statutory authority to compensate any debtor's attorney from funds of the estate. *In re Am. Steel Prod., Inc.*, 197 F.3d 1354, 1356 (11th Cir. 1999); *In re Century Cleaning Servs., Inc.*, 195 F.3d 1053, 1061 (9th Cir. 1999) (Thomas, J., dissenting) ("The plain language of § 330(a) is not ambiguous: it precludes an award of attorney's fees to Chapter 7 debtors' attorneys from the bankruptcy estate.").

2. Given the complete absence of any statutory authority to compensate a chapter 7 debtor's attorney, petitioner argues that Section 330(a)(1) should be judicially revised to include the phrase "or the debtor's attorney." In petitioner's view (Pet. Br. 16, 28), the absence of that phrase reflects a "scrivener's error" caused by a "slip of the pen" of a drafter who deleted the phrase during the 1994 amendments to Section

330(a). See *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1060 (Reinhardt, J.). What petitioner requests, however, "is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Iselin* v. *United States*, 270 U.S. 245, 251 (1926). This Court, however, does not have "*carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States* v. *Locke*, 471 U.S. 84, 95 (1985). "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Ibid.* (quoting *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)). That conclusion is compelled out of "deference to the supremacy of the Legislature, as well as recognition that Congressman typically vote on the language of a bill." *Ibid.*

Accordingly, when "the statute's language is plain, 'the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Hartford Underwriters Ins.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). In other words, when the "result the text produces is not necessarily absurd, [it] cannot be dismissed as an obvious drafting error." *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989); see *Union Bank* v. *Wolas*, 502 U.S. 151, 163 (1991) (Scalia, J., concurring) (A scrivener's error is one that "produc[es] an absurd result.").

This Court found a scrivener's error subject to judicial correction in *United States National Bank* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993). In that decision, the Court disregarded

quotation marks appearing in the Act of Sept. 7, 1916, ch. 461, 39 Stat. 753, and held that "the placement of the quotation marks in the 1916 Act was a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design." 508 U.S. at 462. The Court invoked the settled rule permitting courts to "disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute." *Ibid.* (quoting *Hammock* v. *Loan & Trust Co.*, 105 U.S. 77, 84-85 (1881)). The Court also found that, based on "*overwhelming evidence* from the structure, language, and subject matter of the 1916 Act," "[t]he true meaning of the 1916 Act is *clear beyond question*." *Ibid.* (emphasis added).

Petitioner here requests a significant extension of that decision. Petitioner seeks not to repunctuate the statute, or, indeed, to interpret any particular statutory text. Rather, he seeks to insert an entire phrase that is conspicuously missing from the Code in order to create a substantive authorization for chapter 7 debtors' attorneys to be given priority over creditors in the distribution of estate assets. Accordingly, even if there were some basis for petitioner's claim of a drafting error in removing the phrase "or the debtor's attorney" —which there is not—the relief petitioner seeks would be impermissible. As this Court stated in *Iselin*, 270 U.S. at 251, "[t]o supply omissions transcends the judicial function." See also *United States* v. *Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think * * * is the preferred result."). In her concurring opinion in *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 142 (1995), Justice Ginsburg similarly

observed that "[c]orrecting a scrivener's error is within this Court's competence, see, *e.g.*, [*United States Nat'l Bank*, *supra*], but only Congress can correct larger oversights of the kind presented by the OWCP Director's petition," *i.e.*, Congress's failure to confer standing on the Director when it amended the statute at issue.

There is particular reason for the Court to hesitate here before embarking on the judicial creation of a substantive right for all debtors' attorneys to seek compensation from the bankruptcy estate. Congress has shown considerable willingness to amend the Bankruptcy Code in order to correct perceived flaws or achieve policy goals, and in fact has done so many times since 1994 without choosing to insert language authorizing the use of chapter 7 estates to pay debtors' lawyers.[2]

Indeed, far from acting to authorize such payments, Congress has specifically declined to pass three bills that would have added the phrase "or the debtor's attorney" to Section 330(a)(1). H.R. 120, 105th Cong., 1st Sess. § 7 (Jan. 7, 1997); H.R. 764, 105th Cong., 1st Sess. § 7 (Nov. 13, 1997); S. 1559, 104th Cong., 2d Sess. § 4 (Aug. 2, 1996). Similarly, the current bankruptcy reform bill passed by the House would amend Section 330(a)(1) without reinserting the phrase "or the debtor's attorney." H.R. 975, 108th Cong., 1st Sess.

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[2] Pub. L. No. 107-204, § 803(1)-(3), 116 Stat. 801 (2002); Pub. L. No. 106-554, § 1(a)(5) [Tit. I § 112(c)], 114 Stat. 2763A-393 to 2763A-396 (2000); Pub. L. No. 106-420, § 4, 114 Stat. 1868 (2000); Pub. L. No. 106-181, § 744(a) and (b), 114 Stat. 175-176 (2000); Pub. L. No. 105-277, § 603, 112 Stat. 2681-886 (1998); Pub. L. No. 105-244, § 971(a), 112 Stat. 1837 (1998); Pub. L. No. 105-183, §§ 2-4, 112 Stat. 517-518 (1998); Pub. L. No. 104-193, § 374(a)(1)-(4), 110 Stat. 2255 (1996); Pub. L. No. 104-134, § 101, 110 Stat. 1321-74 (1996); Pub. L. No. 104-88, § 302, 109 Stat. 943 (1995).

§§ 332(b), 333 (Mar. 19, 2003); 149 Cong. Rec. D258, D262 (daily ed. Mar. 19, 2003). In short, "[t]he current version of § 330(a) has been in force now for eight years and Congress has not elected to recognize that it made a scrivener's error when it amended the statute in 1994." Pet. App. 9a. While such subsequent legislative history may be a suspect interpretive tool in other contexts, it is a significant obstacle to petitioner's ability to carry the burden of showing that the text of Section 330(a) can only be explained as a scrivener's error. Accordingly, at least in the absence of "overwhelming evidence" demonstrating "beyond question" (*United States Nat'l Bank*, 508 U.S. at 462) that Congress could not have intended to remove the phrase "or the debtor's attorney" from Section 330(a), the statutory text must be enforced as written.

B. The Statutory Context Is Consistent With Congress's Intentional Deletion Of The Phrase "Or The Debtor's Attorney"

1. The starting point in discerning congressional intent is, of course, the text of the statute. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999); *Schreiber* v. *Burlington N., Inc.*, 472 U.S. 1, 5 (1985). "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. * * * [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). That presumption should apply in this case. The most efficient and direct way to eliminate compensation for debtors' attorneys was the precise course that Congress chose here, *i.e.*, the deletion of "the debtor's attorney" from the list of eligible officers entitled to receive compensation under Section

330(a)(1). "[B]y deleting 'to the debtor's attorney' from the statute, Congress has clearly indicated that the debtor's attorney may not be compensated from the estate." *In re Pro-Snax Distribs., Inc.*, 157 F.3d at 425.

Petitioner contends (Pet. Br. 4, 17, 20, 25) that the omission of the phrase "or the debtor's attorney" reflects a scrivener's error because, while Section 330(a)(1) excludes the debtor's attorney from the list of eligible officers entitled to receive compensation, Section 330(a)(1)(A) permits an award of "reasonable compensation for * * * services rendered by the trustee, examiner, professional person, or *attorney*." The most logical explanation for the "attorney" reference, however, is that Congress failed to make corresponding changes to the parts of Section 330(a)(1)(A) that were affected by Congress's deliberate removal of the phrase "or the debtor's attorney" from Section 330(a)(1). Cf. *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001) ("The canon requiring a court to give effect to each word '*if possible*' is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute.'") (quoting Karl Llewellyn, *The Common Law Tradition* 525 (1960)). Making that corresponding change might have resulted in a cleaner text, but the fact remains that omitting the critical, operative reference to "the debtor's attorney" was the most direct and efficient way to implement the change.

More importantly, the reference to "attorney" in Section 330(a)(1)(A) does not render the statute unenforceable as written. As discussed, Section 330(a)(1) permits the court to award fees to "a professional person employed under section 327 or 1103." 11 U.S.C. 330(a)(1). The Code expressly contemplates that the phrase "a professional person" encompasses an attorney em-

ployed by the trustee under Section 327 or by chapter 11 creditor committees under Section 1103. 11 U.S.C. 327, 328(c), 1103. Accordingly, as the court of appeals explained, the phrase "a professional person employed under section 327 or 1103 could be the antecedent to 'attorney' as used in § 330(a)(1)(A), because the Trustee is authorized to hire an attorney as a professional person." Pet. App. 8a (citation omitted). Although "the reference in § 330(a)(1)(A) to 'attorney' may be superfluous," *id.* at 9a, it is not "necessarily absurd," *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. at 134, and therefore does not justify judicial reinsertion of language that Congress unambiguously omitted.[3]

For similar reasons, petitioner errs in relying (Pet. Br. 4, 14, 20) on the fact that Section 330(a)(1) contains a grammatical error: there is a missing "or" between the phrases "an examiner" and "a professional person." The omission of a conjunction, however, "is an oversight that is as consistent with the *deliberate* deletion of the words 'debtor's attorney' as it is with the inadvertent deletion of those words from that section." Pet. App. 9a. The absence of a conjunction also does not affect the substance or application of the text because "[the] omission does not change the meaning of the words around it." *In re Pro-Snax Distribs., Inc.*, 157 F.3d at

[3] Petitioner mistakenly suggests (Pet. Br. 18-19) that the reference to "attorney" in Section 330(a)(1)(A) "literal[ly]" authorizes an award of fees to a chapter 7 debtor's attorney. As petitioner elsewhere concedes (Pet. Br. 4), Section 330(a)(1)(A) merely lists "parties that provide compensable services" (including paraprofessional persons), while Section 330(a)(1) "identifies persons who may be paid compensation." Thus, only persons who are included in the latter provision may be awarded compensation from the estate; chapter 7 debtors' attorneys are notably absent from that provision.

425 n.14. "Indeed, all that the omission would signify to a reader unfamiliar with the pre-1994 statute is the typographical deletion of 'or' before the phrase 'a professional person.'" *Ibid.* Such a missing conjunction is not uncommon. The United States Code is replete with such instances.[4]

2. The structure of Section 330(a) is also consistent with Congress's intentional exclusion of the previously existing authority to compensate a chapter 7 debtor's attorney. At the same time that Congress enacted Section 330(a)(1) to limit fee awards to trustees, examiners, and professional persons employed under Sections 327 and 1103, Congress added Section 330(a)(4)(B) to authorize compensation to a limited class of debtor's attorneys. Section 330(a)(4)(B) provides that "*[i]n a chapter 12 or 13 case* in which the debtor is an individual, the court *may allow* reasonable compensation to *the debtor's attorney* for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set

[4] *E.g.*, 7 U.S.C. 136(hh)(3)(B); 8 U.S.C. 1101(a)(27); 8 U.S.C. 1324a(b)(1)(B); 12 U.S.C. 1715z-14(b); 12 U.S.C. 3303(a); 15 U.S.C. 78c(a)(34)(G); 15 U.S.C. 5201(b); 16 U.S.C. 3166(b)(2); 16 U.S.C. 3372(a); 16 U.S.C. 3911(a)(1)(A); 16 U.S.C. 4723(a)(1)(F); 18 U.S.C. 1030(a); 20 U.S.C. 1091(a); 22 U.S.C. 1972; 22 U.S.C. 2198; 22 U.S.C. 4802(c); 25 U.S.C. 1613a(b)(3)(A); 25 U.S.C. 3001(15); 26 U.S.C. 6038B(a); 42 U.S.C. 405(j)(4)(B); 42 U.S.C. 415(i)(1); 42 U.S.C. 1395bb(a); 42 U.S.C. 1395ww(d)(5)(F)(vii)(II); 42 U.S.C. 1396a(a)(10)(A); 42 U.S.C. 1436a(i)(2); 42 U.S.C. 3026(a); 42 U.S.C. 5633(a)(3)(E); 42 U.S.C. 7651f(a); 42 U.S.C. 10138(b)(5); 42 U.S.C. 13992; 42 U.S.C. 14072(a)(3); 47 U.S.C. 396(i)(1).

forth in [Section 330(a)]." 11 U.S.C. 330(a)(4)(B) (emphasis added).[5]

If Congress had intended to permit compensation for chapter 7 debtors' attorneys, it naturally would have included them in Section 330(a)(4)(B), which "allow[s]" a court to award fees to a debtor's attorney, but only in cases under chapters 12 and 13. "Thus, although Chapter 12 and Chapter 13 debtors' attorneys were also affected by the amendment to § 330(a), Congress specifically added a mechanism providing for their compensation." *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1062 (Thomas, J., dissenting). "The inclusion of Chapter 12 and Chapter 13 debtors' attorneys in a new section of the statute, coupled with the omission of 'debtor's attorney' from the general section, lends support to the conclusion that the choice was deliberate under the statutory construction principle of *expressio unius est exclusio alterius*." *Ibid.*

Petitioner is also wrong in arguing (Pet. Br. 23) that Section 330(a) necessarily contemplates compensation to all debtors' attorneys because Section 330(a)(4)(B) permits the compensation of attorneys for chapter 12 and 13 debtors under a standard that is an "exception" to the general standards set forth in Section 330(a)(4)(A). The authority to compensate those attorneys does not depend on an interpretation of the statute that would authorize compensation of all debtors' attorneys. Section 330(a)(4)(B) *itself* authorizes estate funds to be awarded to attorneys for chapter 12

[5] Chapter 13 allows individuals with regular income to satisfy their debts through a repayment plan. 11 U.S.C. 1301 *et seq.* Chapter 12 similarly allows family farmers with regular annual income to satisfy their debts through a repayment plan. 11 U.S.C. 1201 *et seq.*

and 13 debtors by providing that the court "may allow" reasonable compensation to those attorneys based on a consideration of the benefit to the chapter 12 or 13 debtor and "the other factors set forth in this section." Section 330(a)(4)(B) also by its own terms makes applicable to requests for compensation by chapter 12 and 13 debtors' attorneys the factors that the court considers in awarding fees to those seeking compensation under 11 U.S.C. 330(a)(1), *i.e.*, trustees, examiners, and professional persons employed under Sections 327 and 1103.

Among those factors is the prohibition in Section 330(a)(4)(A) that bars compensation if the services were not "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." 11 U.S.C. 330(a)(4)(A)(ii). Thus, the "[e]xcept as provided in subparagraph (B)" clause at the beginning of Section 330(a)(4)(A) authorizes the court to award fees to a chapter 12 or 13 debtor's attorney under "subparagraph (B)," even where the services do not benefit the estate, as long as the services benefit the *debtor*. That reading is consistent with the provision's history, which shows that Section 330(a)(4) was derived from a previous version of S. 540, 103d Cong., 1st Sess. (1993), which, before it was limited to chapter 12 and 13 debtors, would have provided that, "[i]n a case in which the debtor is an individual, the court shall allow reasonable compensation for services by the debtor's attorney representing the interests of the debtor without regard to the benefit of such services to the estate." 140 Cong. Rec. S4416 (daily ed. Apr. 19, 1994); see p. 24, *infra*. Accordingly, construing Section 330(a) in accordance with its text yields no interpretive difficulties and is consistent with the legislative evolution of the 1994 amendments.

Petitioner similarly errs in arguing (Pet. Br. 24) that, because Section 330(a)(4)(B) applies when the attorney represents the chapter 12 or 13 *debtor*, there must be some other authorization in Section 330(a)(1) to compensate such an attorney when he "represent[s] the interests of *the debtor's estate*." *Trustees*, not chapter 7 debtors or debtors' attorneys, represent the estate. 11 U.S.C. 323(a). Section 330(a)(4)(B) moreover permits a chapter 12 or 13 debtor's attorney to be compensated for representing *the debtor* when his services benefit the debtor as well as the estate. 11 U.S.C. 330(a)(4)(B). Such a benefit typically occurs in chapter 12 and 13 under which the debtor proposes a repayment plan and remains in possession of all property of the estate. 11 U.S.C. 1203, 1207(b), 1221, 1303, 1304, 1306(b), 1321. No similar circumstances are present under chapter 7. See pp. 35-36, *infra*.

3. Petitioner's reading of Section 330(a)(1) should also be rejected because it would circumvent a specific provision in the Code that addresses the circumstances under which the debtor's attorney may be compensated for services that benefit the estate. As discussed, Section 330(a)(1) permits a court to award compensation to individuals, including attorneys, retained by the trustee as professional persons under Section 327. 11 U.S.C. 327, 328(c), 330(a)(1). In particular, Section 327(e) permits "[t]he trustee, with the court's approval, [to] employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such an attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed." 11 U.S.C. 327(e). Section 327(e) thus explicitly entrusts the trustee, a fiduciary

who represents the estate on behalf of creditors (11 U.S.C. 323(a); *Mosser* v. *Darrow*, 341 U.S. 267, 271 (1951)), with the responsibility of determining when to hire a former debtor's counsel, and the Code permits such retention only if a court concludes that counsel does not have a conflict of interest and his services serve a special purpose and further the best interests of the estate.[6]

Under petitioner's reading of the statute, however, a chapter 7 debtor's counsel would be able to bypass altogether the provisions of Section 327(e) while still obtaining compensation from the estate. Petitioner freely admits (Pet. Br. 32) that Section 327 is unsatisfactory from his perspective, because retention under Section 327 is "sufficiently uncertain—including because the choice would be left to the trustee and because the debtor's counsel may be deemed to have a preclusive conflict of interest." This Court should reject an interpretation that would usurp the trustee's authority under Section 327(e) to determine whether counsel's services are necessary, and that would permit counsel with a conflict to seek compensation under Section 330(a).[7]

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[6] In the United States Trustees' experience, trustees usually retain special counsel to litigate claims made against and on behalf of the estate. See also David Tatge et al., *Chapter 7 Bankruptcy Trustee's Manual* § 4.28 (1993).

[7] As discussed, the Code expressly permits chapter 12 and 13 debtors' counsel to seek fees from the estate. Moreover, because chapter 12 and 13 debtors remain in possession of the estate, see p. 20, *supra*, and chapter 12 and 13 trustees do not collect and reduce to money the property of the estate, 11 U.S.C. 1202(b)(1) and 1302(b)(1), counsel's services for the chapter 12 and 13 debtor with respect to claims made against and on behalf of the estate would not usurp the trustee's role under Section 327(e).

4. Petitioner also relies (Pet. Br. 24-25) on Section 330(a)(5)'s direction to courts to reduce a final award of professional fees by any interim compensation awarded under 11 U.S.C. 331, which provides for interim compensation to, *inter alia*, "a debtor's attorney." Petitioner's argument lacks merit. Section 331 provides that various persons, including "a debtor's attorney," "may apply to the court * * * for such compensation for services * * * or reimbursement for expenses * * * *as is provided under section 330 of this title.*" 11 U.S.C. 331 (emphasis added). The authority to award interim compensation under Section 331 is thus expressly tied to the authority of the court to award final compensation under Section 330. Read together, Sections 330(a)(5) and 331 provide that debtors' attorneys who are authorized under Section 330 to seek compensation, *i.e.*, attorneys for debtors in chapter 12 and 13, may seek an interim award of fees to be credited in the final award of compensation. That straightforward result provides no support for petitioner's counter-textual interpretation of the statute.

C. The Legislative History Is Consistent With An Intentional Deletion Of The Phrase "Or The Debtor's Attorney"

Petitioner places heavy reliance (Pet. Br. 18, 25-30) on the legislative history of the 1994 amendments to Section 330 in attempting to show that Congress inadvertently deleted the phrase "or the debtor's attorney" from the statute. The history, however, is consistent with an intentional deletion of the phrase, and thus does not demonstrate "beyond question" (*United States Nat'l Bank*, 508 U.S. at 462) that the deletion was inadvertent.

1. The revised version of Section 330 originated as Section 309 of a Senate bill, S. 540, 103d Cong., 1st Sess., which was introduced in the Senate on March 10, 1993, and referred to the Committee on the Judiciary. 139 Cong. Rec. S2610, S2621-2622 (daily ed. Mar. 10, 1993). Section 309 originally did not diminish the existing right of any debtor's attorney to seek fees but, *inter alia*, deleted the phrase "of this title" from the original 1978 Act and added new language requiring consideration of the views of the United States Trustees:

> **Section 309. Professional Fees.**
>
> Section 330(a) of title 11, United States Code, is amended to read as follows:
>
> "(a)(1) After notice to the parties in interest and the United States trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103, or the debtor's attorney, after considering comments and objections submitted by the United States Trustee in conformance with guidelines adopted by the Executive Office for United States Trustees pursuant to section 586(a)(3)(A) of title 28—
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
>
> (B) reimbursement for actual, necessary expenses.

139 Cong. Rec. at S2621-S2622. That version of the bill also set forth new criteria for awarding compensation in a new provision, Section 330(a)(2), and added another provision, Section 330(a)(3), which provided that "[t]he court shall not allow compensation for duplication of services or for services that are not either reasonably likely to benefit the debtor's estate or necessary in the administration of the case." *Id.* at S2622.

On October 28, 1993, the Judiciary Committee reported S. 540 to the Senate with a new provision, Section 330(a)(3)(B), which would have provided that, "[i]n a case in which the debtor is an individual, the court shall allow reasonable compensation for services *by the debtor's attorney* representing the interests of the debtor without regard to the benefit of such services to the estate." S. 540, 103d Cong., 1st Sess. (1993) (emphasis added); 139 Cong. Rec. S14,625 (daily ed. Oct. 28, 1993).

On April 19, 1994, S. 540 was brought before the Senate for debate. 140 Cong. Rec. at S4405, S4415-4416. On April 20, 1994, the day before the phrase "or the debtor's attorney" was deleted from the bill, Senator Heflin explained that Section 309 of S. 540 was being revised in order to encourage debtors to file for bankruptcy protection under chapter 13:

> During the course of our hearings, it became very apparent that chapter 13 is often the best overall process for debtors, creditors, and the national economy. Numerous bankruptcy judges have indicated that most individuals want to pay their debts in a manner similar to the program offered under chapter 13 of this code. Unfortunately, the use of this chapter is not widespread throughout the country, and many people are simply not informed that this

> option is available when they seek the Bankruptcy Code's protection. This title contains many provisions that take into account these concerns.

140 Cong. Rec. S4507 (daily ed. Apr. 20, 1994); accord *id.* at S4505, S4506.

The following day, Senator Heflin, on behalf of Senator Metzenbaum, introduced Amendment No. 1645, which revised Section 330 with language identical to that ultimately adopted by Congress later that year. 140 Cong. Rec. S4741-S4742 (daily ed. Apr. 21, 1994); *id.* at S4646. The Senate unanimously passed the bill the same day. *Id.* at S4666, D418.

Amendment No. 1645 is consistent with deliberate action by Congress in important respects. The amendment both deleted the phrase "or the debtor's attorney" from the committee's version of Section 330(a)(1) and simultaneously authorized in Section 330(a)(4)(B) compensation solely to attorneys for chapter 12 and 13 debtors. 140 Cong. Rec. at S4741-S4742. Not only is petitioner factually wrong in asserting (Pet. Br. 25) that the 1994 amendments to Section 330 contained no "substantive" change, but rather, "the fact that Congress carefully reexamined and entirely rewrote the * * * provision * * * supports the conclusion that the text * * * as enacted reflects the deliberate choice of Congress." *Union Bank* v. *Wolas*, 502 U.S. at 160.

Other features of the amendment also signal a deliberate intent to preclude chapter 7 debtors' attorneys from seeking compensation out of estate funds. In addition to deleting the authority to compensate all debtors' attorneys from Section 330(a)(1), the amendment accomplished a similar result by deleting the language in the committee's version of the bill that

would have authorized compensation for *any* individual debtor's attorney, including an individual chapter 7 debtor's attorney, when the services were necessary and beneficial to the debtor. In light of the concerns expressed by Senator Heflin, Amendment No. 1645 replaced the committee's language with a new provision, Section 330(a)(4)(B), which authorized compensation solely to attorneys for individual debtors in chapters 12 and 13. That elimination of authority to compensate attorneys for individual chapter 7 debtors was undoubtedly intentional, and it supports the conclusion that Congress acted with similar intent in deleting the authority to compensate such debtors' attorneys in Section 330(a)(1).

Likewise, the deletion of the phrase "or the debtors' attorney" from Section 330(a) comports with the view of the amendment's sponsor, Senator Metzenbaum, that "chapter 13 is often the best overall process for debtors, creditors, and the national economy," 140 Cong. Rec. at S4507, presumably because chapter 13 enlarges the sources of repayment to creditors by drawing upon post-petition income to fund a repayment plan, 11 U.S.C. 1321-1328. By making available estate funds to compensate only chapter 12 and 13 debtors' attorneys, the 1994 amendments provided an incentive for debtors' attorneys to educate their clients about the potential advantages to the debtor of a chapter 13 bankruptcy petition, rather than a chapter 7 liquidation. Given the concern that "[u]nfortunately, the use of this chapter [13] is not widespread throughout the country, and many people are simply not informed that this option is available when they seek the Bankruptcy Code's protection," 140 Cong. Rec. at S4507, Congress rationally could have sought to remedy this perceived problem and to encourage the use of chapter 13 by precluding debtors' attorneys from seeking compensation from chapter 7 estates.

2. The events following the Senate's passage of Amendment No. 1645 further suggest that the members of Congress were aware of the text of the legislation that they enacted. As an initial matter, the members of Congress had *over five additional months* to read and consider Amendment No. 1645 before final passage of the legislation as H.R. 5116 by the House on October 5, 1994 (140 Cong. Rec. at H10,917), and by the Senate on October 6, 1994 (*id.* at S14,461).[8] During that intervening period, moreover, the deletion of the phrase "or the debtor's attorney" was specifically brought to Congress's attention.

On August 17, 1994, three months after the Senate passed Amendment No. 1645, the House Subcommittee on Economic and Commercial Law held hearings on bankruptcy reform. Among the written materials submitted to the committee for the hearing was a statement by National Association of Consumer Bankruptcy Attorneys (NACBA). The NACBA is "the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bank-

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[8] Although the House held hearings on bankruptcy reform in August 1994, no bankruptcy reform bill was apparently formally introduced in the House until September 28, 1994, when H.R. 5116 was introduced and referred to the Committee on the Judiciary without any amendment to Section 330. 140 Cong. Rec. D1153, D1155 (daily ed. Sept. 28, 1994); *id.* at H10,006. The House Committee on the Judiciary reported H.R. 5116 to the House on October 4, also without amendment to Section 330. 140 Cong. Rec. at H10,726. The same day H.R. 5116 was amended to include, among other things, a revised Section 330 with language conforming to S. 540 as passed by the Senate. *Id.* at H10,752, H10,758-10,759.

ruptcy debtors," NACBA Pet. Am. Br. 2, a class that comprises approximately 98% of all chapter 7 debtors <http://www.uscourts.gov/Press_Releases/cy02. pdf (table F-2)>. In analyzing S. 540, the NACBA informed the members of the Committee that the provision regarding professional fees

> appears to have some minor drafting errors, including the apparently inadvertent *removal of debtors' attorneys* from the list of professionals whose compensation awards are covered by section 330(a).
>
> *NACBA does not oppose this provision, since it contains language ensuring that chapter 12 and 13 individual debtors' attorneys may be awarded compensation* for their work in protecting the debtor's interests in a bankruptcy case.

Bankruptcy Reform: Hearing on H.R. 5116 Before the Subcomm. on the Economy and Commercial Law of the House Comm. on the Judiciary, 103d Cong., 2d Sess. 551 (1994) (emphasis added). "Despite having the specific impact of the Senate bill on Chapter 7 debtors' attorneys called to its attention, the House of Representatives passed House Bill 5116, which included the text of § 330 as passed by the Senate." *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1063 (Thomas, J., dissenting).

The NACBA's testimony is the *only* direct evidence relating to petitioner's assertion of a scrivener's error, and it is in clear tension with petitioner's theory. It shows that Congress was affirmatively notified of both the deletion of the phrase "or the debtor's attorney" and the lack of any objection to the deletion, and Congress passed the statute as written. That sequence

of events makes it highly unlikely that the deletion was a mere accident, and the NACBA's outright acquiescence in the provision certainly renders it difficult to conclude that a rational Congress could not have deleted the phrase "or the debtor's attorney" from the statute. Petitioner's retort is that, even were members of Congress "aware of this snippet, they likely agreed with its conclusion that the omission was inadvertent." Pet. Br. 29. Acceptance of that contention, however, would turn the doctrine of scrivener's error on its head, since it would permit statutory amendment by judicial fiat even where Congress *consciously* enacts the words of a statute.

3. Petitioner argues (Pet. Br. 14, 18, 25-28) that Congress deleted the phrase "or the debtor's attorney" only as a "last minute" addition to the Bankruptcy Reform Act of 1994, and did so inadvertently when the statute's drafter removed the phrases appearing immediately before and after the phrase "or the debtor's attorney." As demonstrated above, the Senate had engaged in over a year of deliberations leading up to its passage of S. 540 as revised by Amendment No. 1645, *i.e.* from March 10, 1993 until April 21, 1994. Congress also had an additional five months to review the text of the Senate bill before passage of the final legislation in October 1994 and, in the intervening period, the House was explicitly notified of the omission of the phrase "or the debtor's attorney." See pp. 27-28, *supra*. Thus, the deletion of the phrase "or the debtor's attorney" was the product of a lengthy deliberative process. And in any event, there is no principle of law that deprives a "last minute" statutory change to a bill of its statutory force and effect, or that makes such a change less likely to reflect a deliberate choice by the members of Congress.

Contrary to petitioner's theory, moreover, Amendment No. 1645 made *no* change to the words that appeared immediately before the phrase "or the debtor's attorney." Rather, the phrase "of this title," which had appeared immediately before the phrase "or to the debtor's attorney" in Section 330 of the Bankruptcy Reform Act of 1978, was deleted by the original version of S. 540 that was introduced in the Senate on March 10, 1993, a full year before Amendment No. 1645 removed the phrase "or the debtor's attorney." See p. 23, *supra*. Nor is it significant that Amendment No. 1645 *did* delete the phrase that immediately followed the phrase "or the debtor's attorney" from the committee version of the bill. That phrase related to an entirely different subject matter—comments, objections, and guidelines by the United States Trustees regarding fee applications—and that phrase was separated from the phrase "or the debtor's attorney" by a comma. It is exceedingly unlikely that the statute's drafters, whose specific intent was to make "improvements and modifications from the initial sections adopted by the committee" (140 Cong. Rec. at S4507), failed to notice that they were deleting the phrase "or the debtor's attorney" from the statute, either at the time of the deletion or during the five months leading up to the final passage of the legislation.

4. Petitioner also relies (Pet. Br. 28-29) on the House Report to H.R. 5116 and post-enactment statements by Senator Metzenbaum remarking that the United States Trustees would develop guidelines for "fee applications" under the 1994 amendments to 28 U.S.C. 586(a)(3)(A). H.R. Rep. No. 835, 103d Cong., 2d Sess. 51 (1994); 140 Cong. Rec. S14,597 (daily ed. Oct. 7, 1994) (Sen. Metzenbaum). As an initial matter, the cited House Report related to a bill that contained no

changes to Section 330 of the Code, see note 8, *supra*, and therefore has little bearing on Congress's intent in passing Section 330 as amended. Moreover, nothing in Senator Metzenbaum's statement suggests that chapter 7 debtors' attorneys may receive compensation from the estate. As discussed, Section 330 permits the award of fees to examiners, trustees, and professional persons, as well as chapter 12 and 13 debtors' attorneys, all of whom must submit "fee applications" subject to the United States Trustees' Guidelines. See 28 C.F.R. Pt. 58, App. A.

Senator Metzenbaum's statements also refute the notion that Congress intended the 1994 amendments to "*increase* the compensation paid to counsel," as suggested by petitioner (Pet. Br. 3). In fact, Senator Metzenbaum commented that, "throughout the process of crafting a viable bankruptcy reform proposal, I have reiterated that there is one problem in particular that we must fix—professional fees in bankruptcy." 140 Cong. Rec. at S14,597. The Senator explained that earlier hearings had "revealed a number of examples of how lawyers suck the financial life out of companies by charging exorbitant and often unnecessary fees." *Ibid.* "In light of these abuses," Senator Metzenbaum stated that he was "particularly pleased that [his] proposal relating to professional fees is included in the act." *Ibid.* In short, neither those statements, nor any other piece of legislative history, shows that Congress unquestionably intended to authorize a chapter 7 debtor's attorney to be awarded fees from the bankruptcy estate.

5. Petitioner also argues (Pet. Br. 14-16, 36-42) that Congress would not have eliminated the rights of any debtor's attorney to seek fees without an affirmative statement by members of Congress in the legislative

history. The 1994 amendments to Section 330, however, did not make the seismic shift asserted by petitioner, see pp. 33-35, *infra*, and the NACBA, the group who presumably would have been affected by the omission of the phrase "or the debtor's attorney," did not oppose the amendments because of the specific grant of authority to chapter 12 and 13 debtors' attorneys to seek fees. In those circumstances, Congress's silence is hardly surprising. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("[A]lthough the number of actions comprehended by a literal interpretation of [the statute] is no doubt substantial, the number would not appear so large as ineluctably to have provoked comment in Congress.").

Moreover, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison*, 446 U.S. at 592; accord *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385, n.2 (1992) ("Suffice it to say that legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning.").

Petitioner similarly argues that the Court should "not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." Pet. Br. 36 (citing *Cohen* v. *de la Cruz*, 523 U.S. 213, 221 (1998) (quoting *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990)). That canon is inapposite here. The Court has invoked that principle to interpret terms in the Bankruptcy Code of 1978 that were unclear on their face or to resolve issues not explicitly addressed by the text. *Cohen*, 523 U.S. at 221; *Dewsnup* v. *Timm*, 502 U.S. 410, 419-420 (1992); *Pennsylvania Dep't of Pub. Welfare*, 495 U.S. at 563; *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 245-246 (1989). That principle has never been invoked to reinsert a phrase that Congress specifically struck in an amendment to the Code. Because the omission of "the debtor's attorney" in Section 330(a)(1) is plain on its face in removing the statutory basis for awarding counsel fees to chapter 7 debtors' attorneys, the revised statute is controlling. See *Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. 15, 22 (2000) ("[T]he Code generally incorporates pre-Code practice *in the absence of explicit revision.*") (emphasis added); *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000) ("[P]re-Code practice informs our understanding of the language of the Code, [but] cannot overcome that language. It is a tool of construction, not an extratextual supplement.") (citation and internal quotation marks omitted); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 546 (1994) ("[W]here the meaning of the Bankruptcy Code's text is itself clear, its operation is unimpeded by contrary * * * prior practice.") (citation and internal quotation marks omitted).

D. Enforcing Section 330(a)(1) As Written Furthers Reasonable Policy Objectives

1. Congress's preclusion of fee awards to chapter 7 debtors' attorneys advances legitimate policy goals without adversely affecting the administration of bankruptcy cases, and petitioner's apocryphal allegations to the contrary are without merit. The amendment did not, as petitioner repeatedly suggests (Pet. Br. 5, 14, 15, 19, 30, 36) result in a "profound" or "radical" "sea

change" in bankruptcy practice by preventing an award of fees to all debtor's counsel. Such a change presumably would have garnered an objection by the NACBA during the consideration of the 1994 amendments, but no such objection was forthcoming. As discussed, Section 330(a)(4)(B) expressly authorizes a court to award fees to attorneys for chapter 12 and 13 debtors. 11 U.S.C. 330(a)(4)(B) (see pp. 17-18, *supra*). The Code also permits a former debtor's attorney to be awarded fees when he is employed by the trustee, including in a chapter 7 case. 11 U.S.C. 327(e), 330(a)(1) (see p. 20, *supra*).

In addition, Section 330(a)(1) authorizes compensation to attorneys employed by debtors-in-possession under the reorganization provisions of chapter 11. The Code gives chapter 11 debtors-in-possession "all" statutory powers, rights, and duties of a trustee, except the right to be paid as a trustee. 11 U.S.C. 1107(a); see also 11 U.S.C. 1106. The chapter 11 debtor-in-possession's rights thus include the trustee's right to retain counsel under Section 327 "to represent or assist the trustee in carrying out the trustee's duties." 11 U.S.C. 327(a). Indeed, the Code is explicit in providing that an attorney who was retained by a chapter 11 debtor-in-possession before the filing of a petition "is not disqualified from employment under section 327." 11 U.S.C. 1107(b). Counsel who are retained by chapter 11 debtors-in-possession thus have express statutory authority to seek fees from the estate as "a professional person employed under section 327." 11 U.S.C. 330(a)(1).[9]

[9] Petitioner argues (Pet. Br. 21-22) that an award of fees to counsel for a chapter 11 debtor-in-possession conflicts with an interpretation of the statute that gives "full effect" to the deletion of the phrase "the debtor's attorney." Petitioner is mistaken. The Code unambiguously includes attorneys within the category of "professional persons" who may be retained by the trustee, 11 U.S.C. 327(a), or the chapter 11 debtor-in-possession with the same rights and powers of the trustee, 11 U.S.C. 1107, and the Code unambiguously authorizes compensation to such "professional person[s]" in Section 330(a)(1).

2. Substantial policy reasons support Congress's choice to exclude attorneys fees in chapter 7 cases, and chapter 11 cases where a trustee has been appointed, while permitting estate funds to be used to pay attorneys for debtors-in-possession under chapter 11 and individual debtors in chapters 12 and 13. Debtors-in-possession in chapter 11, like debtors in chapters 12 and 13, pursue along with creditors the common goal of crafting and adopting a repayment plan to pay creditors from an estate that includes post-petition assets and income. Because only the chapter 11 debtor-in-possession is authorized to propose a plan initially, 11 U.S.C. 1121(a), (b) and (c), its counsel's assistance in developing a plan benefits the creditors who are paid from post-petition income and assets. 11 U.S.C. 1122-1129. The same is true for chapters 12 and 13, under which debtors remain in possession of all property of the estate and have the responsibility to propose post-petition repayment plans. 11 U.S.C. 1203, 1207(b), 1221, 1303, 1304, 1306(b), 1321. Because those chapters include post-petition assets in the pool of potential recovery, Congress rationally could have determined to authorize estate funds to be paid to attorneys for debtors in proceedings under those chapters as compensation for their services in assisting the debtor to develop a repayment plan for the benefit of creditors.

A case under the liquidation provisions of chapter 7 is fundamentally different from cases under chapters 11,

12, and 13. A chapter 7 debtor does not administer or control the estate on behalf of creditors. That function is instead performed by the trustee, who is appointed in all chapter 7 cases, 11 U.S.C. 701, and who represents the estate on behalf of creditors, pp. 20-21, *supra*. Moreover, the chapter 7 debtor does not propose a repayment plan. Rather, he "surrender[s] * * * all property of the estate" to the trustee, 11 U.S.C. 521(4), who liquidates the debtor's nonexempt assets for the benefit of the estate's creditors, 11 U.S.C. 704(1), 726.

Significantly, as discussed, the Code gives a trustee who needs legal assistance in administering or liquidating a chapter 7 estate authority to seek court approval to retain counsel. Section 327(a) thus permits "the trustee, with the court's approval, [to] employ one or more attorneys * * * that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. 327(a). And Section 327(e) permits the trustee to retain the former debtor's counsel for a special purpose when in the best interest of the estate.

Additionally, every dollar taken from the chapter 7 estate reduces the amount of funds available for creditors. Because the size of a chapter 7 estate is cast in stone as of the date of the filing of the petition, 11 U.S.C. 727(b), chapter 7 is a zero-sum game. Any diversion of funds from a chapter 7 estate to pay for a debtor's personal attorney reduces the amount of estate funds available to pay creditors. In those circumstances, it was reasonable for Congress to prohibit the siphoning of finite assets in chapter 7 cases by preventing chapter 7 debtors from using estate funds to pay the bills of their personal attorneys.

At the same time, the lack of authorization to use *estate* funds to pay counsel for a chapter 7 debtor does not prevent the debtor from hiring an attorney, as suggested by petitioner (Pet. Br. 2). Quite to the contrary, subject to certain limited exceptions, all assets and income acquired by a chapter 7 individual debtor after the petition is filed belong to the debtor. 11 U.S.C. 541(a)(5) and (6), 726, 727(b). An individual debtor typically will have post-petition funds, particularly his or her salary, that the debtor may use to pay counsel for any post-petition legal services. Similarly, when a corporate chapter 7 debtor is being liquidated, the Code does not restrict the corporation's former shareholders or officers from using their personal funds to pay for legal services in order to further their personal interests.[10]

3. Petitioner argues (Pet. Br. 30-36) that, without access to estate funds, bankruptcy lawyers will be discouraged from representing debtors in performing

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[10] Similar policy reasons support the absence of authority to use estate funds to compensate the debtor's counsel in the unusual case where a chapter 11 trustee is appointed "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management" or because the appointment is in "the interest of creditors." 11 U.S.C. 1104(a)(1) and (2). In those circumstances, the debtor loses its powers over the estate, including the sole right under Section 1121(b) to propose an initial reorganization plan and the rights and powers of a trustee under Sections 327(a), 1106, and 1107 to retain professional persons. It is thus entirely appropriate that the debtor should not be in a position to siphon funds from the estate to pay the debtor's attorney—yet that is the result that would be permissible under petitioner's interpretation. As discussed in the text, moreover, the Code does not restrict the use of post-petition earnings by individual debtors, 11 U.S.C. 541(a)(6), and the Code permits the trustee to retain the debtor's counsel under Section 327(e).

their statutorily imposed duties in the over one million chapter 7 cases filed each year. For several reasons, however, it is the experience and considered view of the United States Trustees, whom Congress has charged with supervising the administration of bankruptcy cases (28 U.S.C. 586(a)(3)), that enforcing Section 330(a)(1) as written has no appreciable detrimental impact upon the administration of chapter 7 bankruptcy cases.[11]

First, the right to seek chapter 7 debtors' counsel fees from the bankruptcy estate has no practical effect in the overwhelming majority of chapter 7 cases. The data that the United States Trustees maintain on chapter 7 cases in the regions they supervise reveal that 96% of chapter 7 cases closed during 2002, *i.e.*, 1,001,697 of the 1,041,065 chapter 7 cases, had no assets in the estate to pay anything to counsel (or creditors for that matter). Thus, it is only in the remaining 4% of chapter 7 cases—less than 40,000 cases annually—that the amendment limits the ability of the chapter 7 debtor's counsel to seek fees from the estate. In those instances, however, Congress has made the rational choice of preserving those funds for creditors and of requiring the chapter 7 debtor to use non-estate, post-

[11] Chapter 7 filing data maintained by the United States Trustees support the conclusion that enforcing Section 330(a)(1) as written does not unduly discourage chapter 7 filings. In the years 1999 and 2000, chapter 7 filings declined nationally. Those filings declined at a lower rate, however, in the Fifth and Eleventh Circuits, which have enforced the statute as written. *In re Pro-Snax Distribs., Inc.*, 157 F.3d 414 (5th Cir. 1998); *In re Am. Steel Prods., Inc.*, 197 F.3d 1354 (11th Cir. 1999). Similarly, in 2001, while chapter 7 filings increased nationally, such filings in the Fifth and Eleventh Circuits increased at a higher rate than the national average.

petition funds to pay for counsel if needed, or to comply with the provisions of Section 327(e) that permit retention of the debtor's counsel by the trustee. See pp. 20, 36-37, *supra*.

Second, the vast majority of chapter 7 debtors who have retained counsel, both before and after Congress amended Section 330, have paid their attorney a flat fee *prior* to filing bankruptcy to compensate the attorney for the typical services provided by counsel. Teresa A. Sullivan et al., *As We Forgive Our Debtors* 23 (1999) ("Because most attorneys insist on being paid in advance, the debtor must find some money for fees and filing before bankruptcy is possible. Some people are literally saving up for their bankruptcies."); Amy L. Good & Dean P. Wyman, *Representing Consumer Debtors: Fiduciary Duties of Counsel*, Prac. Law., Mar. 1999, at 33 ("Chapter 7 attorneys are generally paid a one-time fee immediately before the filing of the bankruptcy petition."); Stanley B. Bernstein et al. *Collier Compensation, Employment and Appointment of Trustees and Professionals in Bankruptcy* ¶ 3.02[1], at 3-2 (2001) ("In the majority of [chapter 7] cases, the debtor's counsel will accept an individual or a joint consumer chapter 7 case only after being paid a retainer that covers the 'standard fee' [which Bernstein estimates as between $750 and $850 in 2001] and the cost of filing the petition.").

Those fees routinely compensate counsel for his work in a chapter 7 case, most of which is completed *before* the petition is filed and the debtor's non-exempt assets become part of the estate under 11 U.S.C. 541. "Proceedings under Chapter 7 differ from cases under other Chapters of the Code in that the bulk of the legal and fact-finding work is done *before* the petition is filed." Rosemary E. Williams, *Bankruptcy Practice*

Handbook § 5:1, at 5-4 (2d ed. 2002); accord *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1064 (Thomas, J., dissenting) ("In many Chapter 7 cases, there is little for the debtor's attorney to do after the petition is filed.").

The Code imposes very limited duties on a chapter 7 debtor. The debtor must complete a bankruptcy petition, a schedule of assets and liabilities, a statement of Financial Affairs, and a disclosure of debts secured by real property. 11 U.S.C. 521(1) and (2); Bankr. R. 4002; 11 U.S.C. App. Official Forms 1, 6, 7. Those duties generally may be performed before the debtor files for bankruptcy. The debtor also must cooperate with the trustee, surrender all property of the estate to the trustee, and appear at any discharge hearing. 11 U.S.C. 521(3)-(5); Bankr. R. 4002(2) and (3). Additionally, the debtor must attend an initial meeting of creditors where he may be asked questions to make sure that he accurately reported assets and liabilities on the bankruptcy filings. 11 U.S.C. 341. Thus, where counsel is retained in chapter 7, the attorney typically analyzes the debtor's financial condition, advises the debtor whether to file bankruptcy, prepares schedules for filing, and appears at the initial meeting of creditors. *Representing Consumer Debtors*, *supra*, at 40.

Petitioner asserts (Pet. Br. 1) that "[t]he debtor" has a duty to "maximize the value of the estate." The decision cited by petitioner, *Louisiana World Exposition* v. *Federal Insurance Co.*, 858 F.2d 233, 246 (5th Cir. 1988)), however, involves a chapter 11 debtor-in-possession, which has the duty of a trustee to manage the estate on behalf of creditors, 11 U.S.C. 1106, 1107(a), 1108. That duty has no application to debtors in chapter 7, who have neither the right nor obligation to control or manage the estate. 11 U.S.C. 323(a), 521(4).

For similar reasons, petitioner errs in attempting to show (Pet. Br. 6-7, 30-31) that the services he performed—such as his work in reviewing proofs of claims, in connection with the adversary complaint, and in investigating flood damage to the estate property—are illustrative of essential services by chapter 7 debtors' attorneys. The chapter 7 *trustee*, not the debtor, reviews proofs of claims, 11 U.S.C. 704(5), reduces to money the property of the estate, 11 U.S.C. 704(1), and acts to preserve the estate's assets, 11 U.S.C. 704(1) and (2). There was thus no need for petitioner to perform those services, which should have been performed by the trustee or counsel retained by the trustee (and subject to the trustee's direction, not the debtor's) under the specific provisions of Section 327.[12]

Based on the limited and generally pre-petition nature of the duties of a chapter 7 debtor, it is the United States Trustees' experience that chapter 7 debtors' counsel routinely receive flat fees before the bankruptcy petition is filed, even in those circuits that allow chapter 7 debtors' counsel to seek fees in "asset" cases (i.e., those relatively few cases in which the chapter 7 estate actually contains some assets for distribution). Indeed, only the most imprudent attorney would fail to secure payment before commencing work for a client who is entering chapter 7. Regardless of the

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[12] Some of petitioner's services were potentially adverse to the estate's interests. Petitioner observes (Pet. Br. 6), for example, that post-conversion he explained to the debtor, a defunct corporation, how it could attempt to reconvert the case to chapter 11. Petitioner's time records also suggest that he drafted a notice of appeal from the order converting the case to chapter 7. Pet. Br. App. 13a. Petitioner was therefore performing services that apparently were designed to benefit the debtor's equity holders, not the estate that petitioner no longer represented.

outcome of this case, the United States Trustees fully expect debtors' counsel in chapter 7 cases to continue to charge a flat fee in advance for their services, rather than work for free and then face the uncertain prospect of seeking judicial approval for an award of fees from the assets (if any) of the liquidating estate.

Because chapter 7 counsel are already routinely fully paid for their services up front, petitioner also errs (Pet. Br. 35) in predicting that enforcement of the statute as written will encourage enhanced flat fees that would unduly reduce the size of the estate. In any event, the Code already ensures that any pre-petition fee arrangement must be reasonable. Section 329 requires any attorney representing a debtor, whether or not the attorney "applies for compensation," to disclose all fee arrangements made within one year of the petition and to return any payment that "exceeds the reasonable value" of counsel services. 11 U.S.C. 329(a) and (b). The Code similarly prohibits preferential payments to counsel. 11 U.S.C. 547(b); *In re Pillowtex, Inc.*, 304 F.3d 246, 250 (3d Cir. 2002); *In re First Jersey Secs., Inc.*, 180 F.3d 504, 508-514 (3d Cir. 1999).[13]

[13] Petitioner notes (Pet. Br. 36 n.7) that some States consider funds that are paid to an attorney for services that have not yet been performed to be potentially refundable to the client. In that instance, such funds may be part of the estate when the petition is filed. 11 U.S.C. 541. Any chapter 7 debtor's attorney who practices in those jurisdictions may nonetheless be compensated out of the debtor's post-petition salary or other income for any post-petition services. As discussed, moreover, most services of the chapter 7 debtor's attorney are typically performed pre-petition, *i.e.*, before the creation of the estate, and an attorney can accordingly be paid reasonable compensation for his pre-petition services.

4. Petitioner also speculates (Pet. Br. 33) that an attorney who represents a chapter 11 debtor-in-possession may find himself ethically compelled to "work[] for free" if the case converts to chapter 7. Conversions, however, form only a very small fraction of chapter 7 cases. Records maintained by the United States Trustees indicate that conversions reflect less than 0.26% of chapter 7 cases. Furthermore, counsel may seek in advance to limit the scope of the representation to his services for the chapter 11 debtor-in-possession as approved by the court under Section 327(a). Cf. Model Rules of Professional Conduct Rule 1.2(c) (2002) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."). In any event, there is no reason to think that the chapter 7 debtor's attorney will be saddled with post-petition work in the typical case, see pp. 39-40, *supra*, and Section 327(e) permits retention of the debtor's counsel as needed.

* * * * *

In sum, the statute as enacted by Congress produces reasonable results that are fully consistent with the proper administration of bankruptcy proceedings. Indeed, the United States Trustees have observed no detrimental effects from the 1994 amendments to Section 330(a) on the administration of bankruptcy cases throughout the country, including in the circuits that have enforced the statute as passed by Congress. In light of the United States Trustees' experience and Congress's refusal over the last eight years to amend Section 330 as urged by petitioner, there is no justification for accepting petitioner's extraordinary request to rewrite the Bankruptcy Code.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 327 of Title 11, U.S. Code, provides:

§ 327. Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best

interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

2. Section 330 of Title 11, U.S. Code, provides:

§ 330. Compensation of officers

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3)(A)[1] In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

[1] So in original.

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any

interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(b)(1) There shall be paid from the filing fee in a case under chapter 7 of this title $45 to the trustee serving in such case, after such trustee's services are rendered.

(2) The Judicial Conference of the United States—

(A) shall prescribe additional fees of the same kind as prescribed under section 1914(b) of title 28; and

(B) may prescribe notice of appearance fees and fees charged against distributions in cases under this title;

to pay $15 to trustees serving in cases after such trustees' services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such $15 shall be paid in addition to the amount paid under paragraph (1).

(c) Unless the court orders otherwise, in a case under chapter 12 or 13 of this title the compensation paid to the trustee serving in the case shall not be less than $5 per month from any distribution under the plan during the administration of the plan.

(d) In a case in which the United States trustee serves as trustee, the compensation of the trustee under this section shall be paid to the clerk of the bankruptcy court and deposited by the clerk into the

United States Trustee System Fund established by section 589a of title 28.

3. Section 331 of Title 11, U.S. Code provides:

§ 331. Interim compensation

A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.